No. 97-2030

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In The

Supreme Court of the United States

October Term, 1997

SCHOOL DISTRICT OF PHILADELPHIA,

Petitioner,

vs.

DELORES SCOTT SULLIVAN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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Respondents filed Briefs in Opposition to the Petitions and Cross-Petitions for Certiorari filed by the School District of Philadelphia; eight private workers' compensation insurance companies; and various Pennsylvania officials responsible, in part, for administering the Workers' Compensation Act, directing or governing the board of the State Workmen's Insurance Fund. Nevertheless, at no point, have Respondents articulated a single compelling reason why certiorari should not be granted or specific issues reviewed.

Respondents debate the timeliness of the Commonwealth officials' filing of their Conditional Cross-Petition for Writ of Certiorari, based upon an erroneous reading of this Court's rules. Moreover, Respondents contend, without reference to the procedural posture of the case or specific pleadings and briefs below, that neither the classification or extent of a Pennsylvania injured worker's interest in benefits were contested issues before the courts below.

Notwithstanding Respondents' stated position that certiorari should be denied, a cursory glance at Respondents' change in posture demonstrates the compelling need for Supreme Court review. During the course of this litigation, Respondents sought to define the interest at issue. Before the trial court, Respondents argued that the issue at hand was a liberty, or in the alternative, a property interest. App. to School District Petition at 56a n.3. Moreover, Respondents sought to define the interest as an interest in the continued receipt of treatment — not an interest in the "bills".

Nevertheless, at this juncture, Respondents concede that "in some sense [it is the] 'bills' [which] are at issue", Brief in Opp. at 9. Adding more confusion as to what interest Respondents really seek to protect, Respondents have not cross-appealed the finding by the Third Circuit that the interest was anything other than a property interest (not a liberty interest) "in the relief the [injured worker subjectively believes] treatment provides." *Compare* App. to School District Petition at 26a, 36a n.23.

Additionally, Respondents do not dispute that there is an irreconcilable split on a question of substantive constitutional law

regarding whether specific treatment of an injured worker constitutes a property interests protected by the Fourteenth Amendment to the United States Constitution.

Stated another way, Respondents tacitly concede that the question of the nature and extent of the interest at issue, an interest that they themselves are hard pressed to define, is an important question of federal law that should be settled by this Court. It is also readily apparent that this matter involves questions which have been decided in a way that conflicts with decisions of other circuits and state courts of last resort.[1]

I. THE PROPERTY INTEREST ISSUE

A. Issue Preserved

Respondents baldly assert that the status of medical benefits as property was not raised in the lower court. Respondents' effort to avoid review of this aspect of the due process holding is unavailing. The proper characterization of Respondents' interest was a key issue in the proceedings below, about which the District Court and the Court of Appeals reached sharply divergent conclusions. Furthermore, the nature and scope of the private interest alleged to be threatened by official action is necessarily subsumed within the *Mathews* balancing test. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1974). Thus it is axiomatic that the issue has been preserved for review.

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1. It must also be noted that this Court should not be misled into believing that this matter is being negotiated or settled away and therefore certiorari need not be granted. The Commonwealth unilaterally altered its form and those alterations do address some of the Third Circuit's criticisms. However, no "negotiations" are ongoing between the Respondents and the Commonwealth regarding further modifications to the system or the underlying merits of this case. Respondent's attorneys have merely indicated they are still unhappy with the system and made and are pressing suggestions mostly geared toward maintaining the status quo when it comes to pre-Act 44 methods. Thus the need for this Court's review of this case is remains acute.

B. The Question Presented Was Pressed and Passed Upon Below

Respondents argue, without citation to the record, that no party contested the nature of the interest Respondents sought to protect or the applicability of the Fourteenth Amendment with respect to those interests. Based upon this assertion and citing *Illinois v. Gates*, 462 U.S. 213 (1983) (a criminal matter on review from a decision of the Illinois Supreme Court dealing with the probable cause determinations and adopting the "totality of the circumstances" approach), denial of certiorari is urged by Respondents.

This claim simply chooses to ignore the nature of this Court's certiorari jurisdiction, the issues and questions posed in this matter, and the circumstances under which the School District was dismissed from this action — on a motion for judgment on the pleadings after the utilization review process was found to be constitutional.

Also ignored is this Court's guidance regarding basic principles of appellate review. In *Gates*, the Court discusses the character of the "pressed or passed upon" rule stressing that the rule is applied differently depending upon the procedural posture of the case. Therein, review was sought from a state supreme court decision and the "pressed or passed upon" principle was strictly construed and applied because the case was one where questions were urged by the state that were not "pressed or passed upon" in the state courts below. Nevertheless, the Court in *Gates* cautions that in cases similar to the one *sub judice* where the matter is on review from a federal court, the rule is not as strictly enforced and appellate jurisdiction may still be appropriate even if issues were not "pressed or passed upon". 462 U.S. 213, 218-219, *citing McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940).

The *Gates* Court also distinguishes "enlargement" of questions instructing that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." 462 U.S. 213, 220 *citing Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

In *Dewey*, the Court stated:

> [I]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised or argued.

462 U.S. 213, 220. Here, the property interest issue was passed upon by the trial court and the Third Circuit. Any "enlargement" of the issue or discussion should certainly be permissible as recognized in *Dewey* and *Gates*.

This Court has also instructed that particularly appropriate issues for review include questions that are in "a state of evolving definition and uncertainty," and are questions "of importance to the administration of federal law." *Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1098 n.8 (1991), *quoting St. Louis v. Praprotnick*, 485 U.S. 112, 120 (1988). It is beyond dispute that the real interest Respondents have sought to protect has been of an evolving and uncertain definition. The unsettled and contradicting application of the Fourteenth Amendment to matters involving workers' compensation systems of the various states demonstrates the importance of the question to the administration of federal law and the need for clarification from this Court.

C. The Interest At Issue

Respondents continue to advance the notion that it is a Pennsylvania injured worker's right to workers' compensation benefits, rather than the worker's wish to continue specific treatment, that is at issue. It is from this perspective that they continue to argue a "vested right in the receipt of specific treatment." However, in Pennsylvania, there is simply no vested right in the receipt of any treatment they wish, as often as they desire the treatment, and at whatever cost the provider chooses to charge. *Compare Jaquay v. Workers' Compensation Appeal Board (Central Property Svs.)*, 1988 WL 480774 (Pa. Cmwlth. Cir. Aug.

18, 1998) (recognizing that the utilization review system was a legislative attempt by the Pennsylvania General Assembly to contain the escalating medical costs to employers through a process where a neutral utilization review organization rendered a determination in an expedient manner).

Additionally, the cases Respondents rely upon deal with suspension or termination of benefits a party claims a vested right in receiving, not a mere delay in the payment for specific medical treatment directly to the provider while the compensability of the treatment is being reviewed by a neutral party. *Compare Board of Regents v. Roth*, 408 U.S. 564 (1972) (questions whether non-tenured professor had liberty or property interest protected by the Fourteenth Amendment in his position with a state university); *Carr v. SAIF Corp.*, 670 P.2d 1037 (1983) (dealing with suspension of workers' compensation benefits where basis for suspension was the workers' failure to attend a medical examination with no valid reason for missing the appointment). No cases cited stand for the proposition that Pennsylvania has granted Respondents any vested interest in any relief they perceive from any treatment they wish to pursue.

II. CONDITIONAL CROSS-PETITION WAS PROPERLY FILED WITHIN THE TIME ALLOWED

Respondents charge that the Commonwealth's Conditional Cross-Petition should be stricken as untimely arguing that only non-supporting petitions can be filed after the 90 day period set forth in Rule 13.1 expires. However, the Conditional Cross Petition was filed timely pursuant to Rule 12.5.[2] Therefore, Respondents attempt to avoid review of the separately presented question regarding whether workers' compensation benefits are public or private in nature is squarely before this Court for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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